Tentative Rulings for April 27, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

16CECG00248 ***BMO Harris Bank N.A. v. Singh*** **(Dept. 502)**

16CECG01065 ***In re Emily Mercy Gutierrez*** **(Dept. 402)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

12CECG00881 ***Seibert v. Laughton*** **will be continued to Wednesday May 4, 2016 at 3:30 p.m. in Dept. 403.**

15CECG01387 ***Quality Spruce Properties, LLC v. Sierra Community Center*** **is continued to Thursday, April 28, 2016 at 3:30 p.m. in Dept. 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(17)

Tentative Ruling

Re: ***Monifi v. Mitroo et al.***
Court Case No. 13 CECG 03806

Hearing Date: April 27, 2016 (Dept. 402)

Motion: Motion for Relief from Dismissal

Tentative Ruling:

To deny without prejudice.

Explanation:

Code of Civil Procedure Section 473

Code of Civil Procedure section 473 allows a party to obtain relief from certain adverse orders entered as the result of a mistake. It provides, in pertinent part, "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Code Civ. Proc., § 473, subd. (b).) A motion for such relief must be made within a reasonable time, and no later than six months after entry of the adverse ruling. (*Ibid*.) This provision is considered the "discretionary relief" provision of section 473. (See *Zamora v. Clayborn Contracting Group, Inc*. (2002) 28 Cal.4th 249, 254 (*Zamora*).)

Section 473, subdivision (b) also provides for mandatory relief: "[n]otwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise or neglect."

Both provisions grant relief from attorney mistake, inadvertence, or excusable neglect. However, "[t]he range of attorney conduct for which relief can be granted in the mandatory provision is broader than that in the discretionary provision, and includes inexcusable neglect. But the range of adverse litigation results from which relief can be granted is narrower." (*Leader v. Health Industries of America, Inc*. (2001) 89 Cal.App.4th 603, 616.)

Finally, Code of Civil Procedure section 473, subdivision (d) provides that, on motion of either party after notice to the other party, the court may "set aside any void judgment or order."

Mandatory Relief is Not Available Here

Courts have interpreted section 473, subdivision (b)'s "attorney affidavit" provision to refuse mandatory relief for a variety of dismissals: dismissals following summary judgment or judgment after trial, dismissals related to the statute of limitations, dismissals for failure to prosecute, and as relevant here, voluntary dismissals in connection with settlements. (*Huens v. Tatum* (1997) 52 Cal.App.4th 259, 263-265 (*Huens*), disapproved on another ground in *Zamora*, *supra*, 28 Cal.4th at p. 256); *Leader v. Health Industries of America, Inc*., *supra*, 89 Cal.App.4th at p. 618.) However, while mandatory relief is not available from a voluntary dismissal, discretionary relief may be available (*Zamora*, *supra*, 28 Cal.4th at p. 254.)

Discretionary Relief is Not Available Here

In *Zamora*, *supra*, 28 Cal.4th 249, the "mistake" occurred when a legal assistant typed the word "against" instead of the phrase "in favor of" when preparing a Code of Civil Procedure section 998 offer to compromise for the attorney's client. (*Id*. at p. 252.) The Supreme Court held, in part, that, following acceptance of the section 998 pretrial settlement offer, the plaintiff might obtain relief through the discretionary relief provision of section 473, subdivision (b). (*Id*. at pp. 258-259, 261.)

" 'A party who seeks [discretionary] relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.' [Citation.] In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent person under the same or similar circumstances" might have made the same error.' [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' [Citation.] 'Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.' [Citation.]" (*Zamora*, *supra*, 28 Cal.4th at p. 258.)

A Judicial Council form CIV-110 Request for Dismissal is a very simple document. If only one party is to be dismissed, the party must be named on the form at item 1(b)(6). No specific party was named at item 1(b)(6) on the dismissal signed and filed by plaintiff's counsel. It is not reasonable to sign a dismissal without reading it and understanding its legal import. (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 755 ["[F]ailure to read the documents does not permit him to avoid their legal effect"]; *Martin v. Cook* (1977) 68 Cal.App.3d 799, 810 [Failure of plaintiff's counsel to carefully read and understand stipulation prior to executing and filing same held inexcusable

conduct].) It would not be appropriate to grant discretionary relief from the voluntary dismissal of the action.

Potential Relief to Plaintiff

Plaintiff may have an argument that she is entitled to relief because she did not authorize the dismissal of Dr. Lee. " 'The attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action but he may not impair the client's substantial rights or the cause of action itself.' " (*Romadka v. Hoge* (1991) 232 Cal.App.3d 1231, 1235.) "[A] dismissal with prejudice disposes of the client's substantive rights and therefore requires for its validity the authorization of the client." (*Id*. at p. 1236.) "[D]ismissal of a cause of action by an attorney acting without any authority from his client is an act beyond the scope of his authority which, on proper proof, may be vacated at any time." (*Whittier Union High Sch. Dist. v. Superior Court* (1977) 66 Cal.App.3d 504, 509.)

However, such relief cannot be granted on this record which does not contain plaintiff's declaration but only the vague hearsay statement of her attorney that "*we* never agreed to dismiss Dr. Lee from this case." (Emphasis added.) If it is true that plaintiff never authorized Dr. Lee's dismissal, plaintiff may bring a motion under section 473, subdivision (d), supported by her declaration of unauthorized conduct by her attorney, to void the dismissal. "An attorney's unauthorized disposition of clients' substantive rights is invalid and a judgment based thereon is therefore void." (*Romadka v. Hoge*, *supra*, 232 Cal.App.3d at p. 1236.) The result is the same whether the attorney's unauthorized dismissal was mistaken (e.g., *Bice v. Stevens* (1958) 160 Cal.App.2d 222, 231-234) or intentional (e.g., *Whittier Union High Sch. Dist. v. Superior Court*, *supra*, 66 Cal.App.3d at pp. 506-509.)

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 4/26/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(30)

Re: ***Gerawan Farming, Inc. v. Agricultural Labor Relations Board***
Superior Court No. 16CECG00411

Hearing Date: Wednesday, April 27, 2016 (**Dept. 403**)

Motion: (1) Respondent ALRB's Request for Judicial Notice
(2) Respondent ALRB's Demurrer to Petition for Writ of Mandate

Tentative Ruling:

To Grant Respondent's Request for Judicial Notice of: Respondent's March 6, 2015 delegation of authority to the General Counsel (Request for Judicial Notice, filed: 3/21/16 Request No. 1).

To Sustain Respondent's demurrer to all of Petitioner's causes of action, without leave to amend.

Explanation:

Judicial Notice

The requirements for judicial notice are: (a) the document must be appropriately drawn to the Court's attention and (b) the adverse party must have adequate notice and opportunity to be heard on the question of the effect of such document (Evid. Code § 453; see *Flores v. Arroyo* (1961) 56 Cal.2d 492; Code Civ.Proc. § 1875, sub. 3; *Hammell v. Britton* (1941) 19 Cal.2d 72, 75; *Stafford v. Ware* (1960) 187 Cal.App.2d 227; *Christiana v. Rose* (1950) 100 Cal.App.2d 46, 52; *In re Estate of Monks* (1941) 48 Cal.App.2d 603, 618; *City of Los Angeles v. Abbott* (1932) 217 Cal. 184, 192; *Sewell v. Johnson* (1913) 165 Cal. 762, 770; *Taliaferro v. Taliaferro* (1960) 178 Cal.App.2d 140, 141.) Demurring party also has the burden of supplying the court with sufficient, reliable and trustworthy sources of information about the matter. (*People v. Maxwell* (1978) 78 Cal.App.3d 124, 130.)

Here, Respondent requests This Court take judicial notice of: the Respondent's March 6, 2015 delegation of authority to the General Counsel. This Court may take notice because Respondent met the general requirements. Respondent appropriately alerted This Court through pleadings filed March 21, 2016, wherein Respondent requested judicial notice and attached a copy of the document as Exhibit 'A.' Respondent provided Petitioner with adequate notice by serving a copy of its request on Petitioner via U.S. mail on March 18, 2016. Respondent also supplied the Court with a copy of this document, which is reliable and trustworthy; document is signed and dated. Respondent's request for Judicial Notice of Respondent's March 6, 2015 delegation of authority to the General Counsel (Request for Judicial Notice, filed: 3/21/16 Request No. 1) is Granted.

Code of Civil Procedure section 430.10(a)

A general demurrer lies where the court lacks subject matter jurisdiction. (Code Civ. Proc., § 430.10(a).) However, it must appear from the *face of the complaint* that the court is *not competent* to act. (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1421*; Buss v. J.O. Martin Co.* (1966) 241 Cal.App.2d 123, 133.) And a court lacks subject matter jurisdiction where exclusive jurisdiction is vested in another tribunal. (*Mitchell v. Scott Wetzel Services, Inc*. (1991) 227 Cal.App.3d 1474, 1477.) A demurrer for lack of subject matter jurisdiction will often be sustained without leave to amend. (*Pauletto v. Reliance Ins. Co*. (1988) 64 Cal.App.4th 597, 599.)

Respondent demurrers to each of Petitioner's causes of action due to This Court's lack of subject matter jurisdiction.

Subject Matter Jurisdiction

Labor cases may come within the jurisdiction of the Agricultural Labor Relations Board (*United Farm Workers v. Superior Court* (1977) 72 Cal.App.3d 268, 273, 276; *United Farm Workers of America, AFL-CIO v. Dutra Farms* (2000) 83 Cal.App.4th 1146, 1161.) And a lawsuit filed before all administrative remedies have been exhausted is considered premature and cannot be maintained, except in the most exceptional of circumstances. (*California Water Impact Network v. Newhall County Water District* (2008) 161 Cal.App.4th 1464; *Collier & Wallis v. Astor* (1937) 9 Cal.2d 202; *City of Fresno v. Superior Court* (1987) 188 Cal.App.3d 1484; *Miller v. United Airlines, Inc*. (1985) 174 Cal.App.3d 878.)

The underlying dispute stems from unfair labor practice charges that were filed against Petitioner by their former employee (a seasonal fieldworker) and the United Farm Workers of America. Thus, Respondent has jurisdiction over this case unless Petitioner can show that it meets an exception to the exhaustion of administrative remedies doctrine.

Exhaustion of Administrative Remedies Doctrine

The mere fact that a litigant has appeared in administrative proceedings before seeking judicial review does not satisfy the exhaustion requirement. The litigant must exhaust the full administrative process to a final decision on the merits, before turning to the courts. (*Coachella Valley Mosquito & Vector Control District v. California Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1080; *Lynn v. Duckel* (1956) 46 Cal.2d 845, 849–50; *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 295; *Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1125; *Kumar v. National Medical Enterprises, Inc*. (1990) 218 Cal.App.3d 1050, 1055; *McHugh v. County of Santa Cruz* (1973) 218 Cal.App.3d 1050, 539; *California Water Impact Network v. Newhall County Water District* (2008) 161 Cal.App.4th 1464.)

Petitioner argues that it is exempt because: Respondent's administrative remedy fails to satisfy the standards of due process, Respondent's actions constitute clear statutory violations, to pursue the administrative remedy would be futile, and irreparable harm will result without judicial intervention.

Due Process

The exhaustion of administrative remedies doctrine does not apply where the agency does not provide for a hearing and the taking of evidence or adequate protection of due process rights (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328; *Petrillo v. Bay Area Rapid Transit Dist*. (1988) 197 Cal.App.3d 798; *City of Los Angeles v. Decker* (1976) 61 Cal.App.3d 444.) In other words, if an administrative remedy fails to satisfy the standards of due process, the exhaustion of administrative remedies requirement is excused. (*Imagistics Intern., Inc. v. Department of General Services* (2007) 150 Cal.App.4th 581.) In: (1) *Lineback v. Printpack* (S.D. Ind. 1997) 979 F.Supp. 831; (2) *Vapor Blast Mfg. Co. v Madden* (7th Cir. 1960) 280 F.2d 205; and (3) *California Coastal Farms, Inc. v. Doctoroff* (1981) 117 Cal.App.3d 156, The Courts (pertinently) defined the circumstances in which judicial intervention would be appropriate.

Petitioner argues that it meets an exception to the exhaustion of administrative remedies doctrine because its claims are *all* based on constitutional violations. Petitioner makes colorable arguments that Respondent: (1) engaged in secret ex parte communications; (2) independently investigated facts and withheld evidence from the accused; and (3) failed to provide an impartial decision-maker. However, Petitioner ignores controlling case law which requires it to exhaust administrative remedies, regardless of whether these arguments have merit (see *Lineback v. Printpack, supra,* 979 F.Supp. 831; *Vapor Blast Mfg. Co. v Madden, supra,* 280 F.2d 205; *California Coastal Farms, Inc. v. Doctoroff, supra,* 117 Cal.App.3d 156; and *Biazevich v Becker, supra,* 161 F.Supp 261.) Accordingly, Petitioner does not meet this exception and is not excused from exhausting the administrative remedy.

Statutory Authority

In *Leedom v. Kyne* (1958) 358 U.S. 184, 188, the United States Supreme Court ruled that district courts can enjoin NLRB proceedings when the Board's action contravenes specific provisions of the law. But under *Leedom,* the basis for jurisdiction is narrow. (*Paulsen ex rel. N.L.R.B. v. All American School Bus Corp*. (E.D. N.Y. 2013) 986 F.Supp.2d 142.) *Leedom* is only applicable when the Board's interpretation of the NLRA would wholly deprive the plaintiff of meaningful and adequate means of vindicating its statutory rights. (*Board of Governors of Federal Reserve System v. MCorp Financial, Inc*. (1991) 502 U.S. 32.)

Petitioner argues that in engaging in ex parte communications with the General Counsel, Respondent exceeded its statutory authority under the California Labor Code and deprived Petitioner its right to a fair hearing. However, in communicating with and seeking approval from Respondent, the General Counsel was acting in accordance with its (delegated) authority (see Respondent's March 6, 2015 delegation of authority to the General Counsel [RJN, filed: 3/21/16 Request No. 1]). That delegation requires the General Counsel to seek case—by-case authorization from Respondent before filing for injunctive relief under Labor Code section 1160.4. (*ibid*.) Petitioner makes no allegation of any violation of this (specific) delegation. Further, as the *Lineback, Vapor Blast, and California Coastal* Courts ruled, Respondent's administrative procedure provides litigants an adequate legal remedy. Accordingly, Petitioner does not meet this exception and is not excused from exhausting the administrative remedy.

Futility
Futility is a narrow exception from the generally applicable exhaustion requirement. (*Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 690; *Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 683; *Gantner & Mattern Co. v. California Employment Comm'n* (1941) 17 Cal.2d 314, 318; *George Arakelian Farms, Inc. v. ALRB* (1985) 40 Cal.3d 654, 662–63.) "Unless a litigant can demonstrate that the administrative agency has indicated its predetermined decision *in the litigant's particular case,* [futility] does not apply even if the outcome in other similar cases is adverse to the litigant's position." (*Imagistics Int'l, Inc. v. Department of General Services* (2007) 150 Cal.App.4th 581, 590; *San Diego Mun. Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1459.)

Petitioner fails to assert any facts *even* suggesting that Respondent has made a predetermined decision in their case. Further, Petitioner's (cited to) past efforts are not indicative of future rulings and certainly do not equate to a final decision on the merits (Opposition, filed 4/14/16 p10 lns18-24). Accordingly, Petitioner does not meet this exception and is not excused from exhausting the administrative remedy.

Irreparable Harm
Immediate judicial review may be permitted when the absence of prompt review would otherwise place the Petitioner in an untenable position or result in irreparable harm as, for example, when apparently conflicting laws both provide for a penalty if their conflicting requirements are not satisfied. In such a case, the court may conclude that the legal remedy of administrative proceedings followed by judicial review is inadequate. (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 7; *American Indian Model Schools v. Oakland Unified School District* (2014) 227 Cal.App.4th 258, 293–95; *United Ins. Co. v. Maloney* (1954) 127 Cal.App.2d 155.) The irreparable harm exception "has been applied rarely and only in the clearest of cases." (*City & County of San Francisco v. International Union of Operating Engineers* (2007) 151 Cal.App.4th 938, 948.)

Petitioner alleges no impending crises of any magnitude. Instead, it alleges an abstract injury caused by the "constitutionally defective process itself" (Opposition, filed: 4/14/16, p13 ln 27-28, p14 lns 1-23, and p15 lns10-13). This assertion does not meet the irreparable harm exception because it is applied in only the clearest of cases, and the alleged injury is anything but clear. Accordingly, Petitioner does not meet this exception and is not excused from exhausting the administrative remedy.

<u>Mandamus</u>
Petitioner argues that mandamus is proper and provides the only means for it to obtain relief. However, this arguments fails because it ignores the *Lineback, Vapor Blast,* and *California Coastal Farms* rulings which validate the administrative process. This argument also addresses the merits of the underlying dispute, which are not appropriately decided on demurrer. When ruling on a demurrer for lack of subject matter jurisdiction, a court may only consider deficiencies on the *face of the complaint*. (*Holiday Matinee, Inc.v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1421; *Buss v. J.O.*

Martin Co. (1966) 241 Cal.App.2d 123, 133.) Opposition addressing anything other than subject matter jurisdiction will not be considered.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 04/25/16.

(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Foster v. Dean***
Superior Court Case No.: 15CECG00902

Hearing Date: April 27, 2016 (**Dept. 403**)

Motion: By Defendant Brandon Thomas Dean for order of determination of good faith settlement

Tentative Ruling:

To grant; the Court will execute the order which has been submitted.

The January 9, 2017 trial date and related hearing dates are all vacated, and an OSC re: default judgment review hearing is set for September 1, 2016, at 10:05 a.m. in Dept. 401.

Explanation:

Defendant Brandon Thomas Dean has met his burden on the motion to demonstrate the settlement was in good faith. (*City of Grand Terrace v. Sup.Ct. (Boyter)* (1987) 192 Cal.App.3d 1251, 1261.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 04/25/16.
(Judge's initials) (Date)

Tentative Rulings for Department 501

(20) **Tentative Ruling**

Re: ***Lanier v. San Joaquin Valley Officials Association et al.***, Superior Court Case No. 13CECG02843

Hearing Date: **April 27, 2016 (Dept. 501)**

Motion: (1) Plaintiff's Motion to Reinstate Default and Reconsideration of Default Judgment

(2) Defendants' Demurrer to Second Amended Complaint

Tentative Ruling:

To deny plaintiff's motion. (Code Civ. Proc. § 1008(a).)

To continue the demurrer to May 18, 2016, at 3:30 p.m. in Department 501. The deadline for the opposition and reply briefs will run from the continued hearing date.

Explanation:

Plaintiff seeks reconsideration of the court's ruling setting aside defendants' default. Defendants' default was set aside by order dated 12/22/15. Code of Civil Proc. section 1008(a) provides that "… any party affected by the order may, within 10 days after service of the party of written notice of entry of the order … make application … to reconsider the matter …" The motion was filed on March 24, 2016. The motion is clearly untimely.

Plaintiff did not file an opposition on the merits of the demurrer, contending that the demurrer was premature because the court had not yet ruled on defendants' motion to set aside default. The court issued a ruling on that motion on April 5, 2016. Since the status of defendants' default was somewhat up in the air at the time plaintiff filed his opposition, the court will continue the hearing so plaintiff can file an opposition on the merits.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 4/25/16.
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Zuniga v. Wal-Mart Stores, Inc. et al.***
Court Case No. 16 CECG 00034

Hearing Date: April 27, 2016 (Dept. 501)

Motion: Demurrer to Complaint

Tentative Ruling:

To overrule the demurrer. Defendant will answer within 10 days of the clerk's service of this minute order

Explanation:

Lack of Demurrer:

A party demurring to a pleading, must file a notice of hearing, a demurrer, a memorandum of points and authorities and a proof of service. (Rylaarsdam & Edmon, California Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) § 7:98.) While the Notice and Demurrer may be combined, the caption must reflect that the document is a demurrer. (Cal. Rules of Court, rule 3.1320(e).) All the grounds for the demurrer must be distinctly stated in separate paragraphs. (Code Civ. Proc., § 430.60; Cal. Rules of Court, rule 3.1320(a).)

While defendant has filed a Notice of Demurrer, no actual Demurrer was filed. Despite this, if we were to address the merits, we would find there were no merits to be addressed.

Lack of Merit:

Defendant demurs on the ground that the exclusive remedy for emotional distress suffered by plaintiff as a result of the harassment she suffered at the hands of defendants is in the worker's compensation system.

"Workers' compensation provides the exclusive remedy against an employer for an injury sustained by an employee in the course of employment and compensable under the workers' compensation law. [Citations.] This precludes a tort remedy against the employer if the conditions of compensation are present." (*Angelotti v. The Walt Disney Co*. (2011) 192 Cal.App.4th 1394, 1403; see Lab. Code, §§ 3600, 3601.)

"[T]he workers' compensation exclusivity rule applies only if the risks resulting in the injury were encompassed within the 'compensation bargain.' [Citation.] … The compensation bargain does not encompass conduct that contravenes a fundamental public policy or exceeds the risks inherent in the employment relationship. [Citations.]" (*Singh v. Southland Stone, U.S.A., Inc*. (2010) 186 Cal.App.4th 338, 366; see *Gantt v.*

Sentry Insurance (1992) 1 Cal.4th 1083, 1100, overruled on another ground in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6.)

"An employer's intentional misconduct in connection with actions that are a normal part of the employment relationship, such as demotions and criticism of work practices, resulting in emotional injury is considered to be encompassed within the compensation bargain, even if the misconduct could be characterized as 'manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance.' [Citation.] Workers' compensation ordinarily provides the exclusive remedy for such an injury. [Citations.] Conduct in which an employer steps out of its ' "proper role" ' as an employer or conduct of ' "questionable relationship to the employment," ' however, ... is not encompassed within the compensation bargain and is not subject to the exclusivity rule. [Citation.]" (*Singh v. Southland Stone, U.S.A., Inc., supra*, 186 Cal.App.4th at p. 367.) Thus, "[t]he workers' compensation exclusivity rule does not apply to any injury resulting from conduct in violation of a fundamental public policy...." (*Id.* at p. 368.)

As noted above, FEHA prohibits discrimination and harassment in the workplace because of sex. (§ 12940, subds. (a), (j); *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 277.) "These prohibitions represent a fundamental public policy decision regarding 'the need to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination.' [Citations.]" (*Lyle, supra*, at p. 277.) Because plaintiff's infliction of emotional distress claims stem from Rico's sexual harassment, a risk not reasonably encompassed in the compensation bargain, the workers' compensation exclusivity rule does not bar plaintiff's infliction of emotional distress claims. (*Singh v. Southland Stone, U.S.A., Inc., supra*, 186 Cal.App.4th at p. 367; accord, *Gantt v. Sentry Insurance, supra*, 1 Cal.4th at p. 1100; see *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338, 1363 [emotional distress based on sexual harassment not barred by exclusivity provisions of workers' compensation laws]; *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 347["[d]iscrimination ... is not a normal incident of employment," and a "claim for damages under [FEHA] [citation] is not preempted by the workers' compensation act"]; *Hart v. National Mortgage & Land Co.* (1987) 189 Cal.App.3d 1420, 1424, 1430 [coworker's alleged acts of making sexually suggestive remarks and gestures and grabbing the plaintiff's genitals were not a normal part of employment relationship].)

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 4/25/16.
(Judge's initials) (Date)

Tentative Rulings for Department 502

03

Tentative Ruling

Re: ***Lightner-Burk v. Fresno County Private Security***
Case No. 15 CE CG 03671

Hearing Date: April 27, 2016 (Dept. 502)

Motion: Defendants/Petitioners' Petition to Compel Arbitration and Stay Proceeding

Tentative Ruling:

To grant the petition to compel arbitration of the dispute. (Code Civ. Proc. § 1281.2.) To grant the motion to stay the civil action pending completion of the arbitration proceedings. (Code Civ. Proc. § 1281.4.)

Explanation:

Under Code of Civil Procedure section 1281.2,

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:
>
> (a) The right to compel arbitration has been waived by the petitioner; or
>
> (b) Grounds exist for the revocation of the agreement.
>
> (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. (Code Civ. Proc., § 1281.2, subd.'s (a)-(c).)

Also, "If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies." (Code Civ. Proc., § 1281.4.)

Thus, the party moving to compel arbitration must establish the existence of a written arbitration agreement between the parties. (Cal. Rules of Court, Rule 3.1330.) Also, the party moving to compel arbitration must establish that it demanded

arbitration from the other party, and that the other party refused to agree to arbitration. (*Mansouri v. Superior Court* (2010) 181 Cal.App.4th 633, 640-641.)

Here, defendants/petitioners have met their burden of establishing the existence of an agreement to arbitrate their disputes over the terms of the buyout agreement. They provide a copy of the buyout agreement, which includes a dispute resolution clause that requires the parties to submit any disputes to mediation, and if that fails, then they will attend arbitration. (Exhibit A to Petition to Compel Arbitration, Buyout Agreement, p. 12, Section VIII: Resolution of Disputes.) The agreement was signed by all owners of the company, including plaintiff/respondent's husband, Donald Burk. The parties also agreed to an amendment to the agreement a few months later, which also contained an arbitration clause and specified that Thomas Simonian would be the arbitrator if there were any disputes requiring arbitration. (Exhibit B to Petition, Buyout Agreement Amendment, p. 2, ¶ 6.) Therefore, defendants have shown that there is an agreement to arbitrate any disputes between the parties.

Defendants also allege that they demanded arbitration after plaintiff filed the present lawsuit. (Petition, ¶ 8.) According to the petition, the parties discussed the dispute and agreed generally that arbitration was needed, but could not agree on dismissing or staying the action. (*Ibid*.) Defense counsel also states that he sent a letter to plaintiff by certified mail on February 29th, 2016, formally requesting mediation of the dispute. (Logoluso decl., ¶ 2.) However, he does not state whether plaintiff responded to the letter, and he filed the motion and petition to compel arbitration the next day. Therefore, defendants have not adequately shown that they demanded arbitration and that plaintiff refused to attend arbitration.

Nevertheless, plaintiff has filed opposition in which she essentially concedes that she is refusing to arbitrate the dispute, since she argues that the arbitration clause is unconscionable and unenforceable. As a result, while defendants have not met their burden of demonstrating a refusal to arbitrate the dispute, plaintiff has waived the error.

Plaintiff contends that the agreement is unenforceable against her because she was not a signatory to the buyout agreement. However, "[a] nonsignatory plaintiff can be compelled to arbitrate a claim even against a nonsignatory defendant, when the claim is itself based on, or inextricably intertwined with, the contract containing the arbitration clause." (*JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1241.)

"We are concerned with the doctrine of equitable estoppel. When a plaintiff brings a claim which relies on contract terms against a defendant, the plaintiff may be equitably estopped from repudiating the arbitration clause contained in that agreement. There is no reason why this doctrine should not be equally applicable to a nonsignatory plaintiff. When that plaintiff is suing on a contract—on the basis that, even though the plaintiff was not a party to the contract, the plaintiff is nonetheless entitled to recover for its breach, the plaintiff should be equitably estopped from repudiating the contract's arbitration clause." (*Id*. at 1239-1240, internal citations omitted.)

Here, plaintiff is suing for an accounting pursuant to the payout provisions of the buyout agreement that her husband and the defendants signed in 2010. Thus, she is essentially arguing that, even though she was not a signatory to the agreement, she is nonetheless entitled to recover for its breach. As a result, she is equitably estopped form repudiating the arbitration clause contained in the agreement. Consequently, the fact that she did not sign the agreement does not prevent defendants from enforcing the arbitration clause against her.

Plaintiff also argues that the agreement is unconscionable because it does not have any express provisions for discovery of documents and facts related to her accounting claim, and she has no other way of obtaining the facts she needs to prove her claim. It is true that the arbitration clause contains no express language regarding discovery in the event that the case is arbitrated. Also, this is not a personal injury or wrongful death case, so the Discovery Act is not automatically incorporated into the arbitration agreement. (Code Civ. Proc. § 1283.1, subd. (a).) However, the arbitrator does have broad powers to order depositions and issue subpoenas for the attendance of witnesses and production of documents upon request of a party. (Code Civ. Proc. §§ 1282.6; 1283.) Thus, plaintiff is not necessarily barred from seeking production of documents or witnesses, or from taking depositions, although she would have to request that the arbitrator order such discovery and the arbitrator would have discretion as to whether to grant the request.

Plaintiff has not cited to any cases specifically holding that an arbitration clause is automatically unconscionable simply because it does not include an express provision for discovery. She merely relies on the general law regarding unconscionability.

"'"[U]nconscionability has both a 'procedural' and a 'substantive' element," the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results. [Citation.] "The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." [Citation.] But they need not be present in the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citations.]" (*Carlson v. Home Team Pest Defense, Inc*. (2015) 239 Cal.App.4th 619, 630.)

"'Procedural unconscionability exists when the stronger party drafts the contract and presents it to the weaker party on a "take-it-or-leave-it basis." [Citation.]' [Citation.] 'However, the fact that the arbitration agreement is an adhesion contract does not render it automatically unenforceable as unconscionable.' [Citation.] Instead, to determine whether an arbitration agreement satisfies the 'procedural element of unconscionability,' courts focus on 'two factors: oppression and surprise. [Citation.]' [Citation.] ' "Oppression" arises from an inequality of bargaining power which results in

no real negotiation and "an absence of meaningful choice." [Citations.] "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.'" [Citation.]" [Citation.]" (*Id*. at 631.)

"'Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create "overly harsh" or "one-sided" results. [Citations.]' [Citation.] 'An arbitration agreement lacks "basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrences.... [Citation.]' [Citation.]" (*Id*. at 634.)

Here, plaintiff has failed to show that the agreement is either procedurally or substantively unconscionable. With regard to procedural unconscionability, plaintiff has not provided any evidence demonstrating that the agreement was imposed on her husband by "stronger parties". Indeed, it appears that the agreement was the result of the consent of all four owners, and there is nothing to indicate that there was any inequality in bargaining power between them, or that the defendants exerted any pressure on plaintiff's husband to sign the agreement on a "take it or leave it" basis.

Nor is there any evidence to support the conclusion that the arbitration clause was entered into as a result of surprise. The agreement is not hidden in fine print, or buried in an excessively lengthy or confusing document. The agreement to arbitrate is clearly labeled, and is in the same size print as the rest of the buyout agreement. Therefore, there is no evidence to support the element of procedural unconscionability.

Likewise, there is no evidence of substantive unconscionability. The agreement does not appear on its face to be overly harsh or one-sided. It requires all members of the company to attend arbitration if there is a dispute over the terms of the buyout agreement, and there is no reason to believe that it unfairly favors one side at the expense of another.

Therefore, the court intends to find that the agreement is not unconscionable, and it will enforce the agreement and require the parties to attend arbitration regarding their dispute. Finally, the court intends to order the present civil action stayed pending the outcome of the arbitration. (Code Civ. Proc. § 1281.4.)

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/25/16.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Cantu v. Rosales***
Case No. 14 CE CG 03838

Hearing Date: April 27th, 2016 (Dept. 502)

Motion: Defendants' Motion to Quash Service of Summons

Tentative Ruling:

To deny defendants' motion to quash service of summons. (Code Civ. Proc. § 418.10, subd. (a)(1).)

Explanation:

Defendants argue that service on them was improper because plaintiff did not serve them within 60 days of filing the complaint, as required by Rule of Court 3.110, subd. (b). However, under Rule of Court 3.110, subd. (e), "The court, on its own motion or on the application of a party, may extend or otherwise modify the times provided in (b)-(d)."

Here, it is true that plaintiff did not serve defendants within 60 days of the filing of the complaint, and in fact the proofs of service indicate that service was not made until February 16th, 2016, more than a year after the complaint was filed. However, the plaintiff obtained several extensions of time from the court to serve defendants after she attended multiple order to show cause hearings. In any event, even if there was a violation of the Rule of Court regarding "fast track" cases, the remedy would be dismissal of the case, not quashing service of summons. (See Rylaarsdam v. Edmon, Cal. Prac. Guide (The Rutter Group 2016) § 4:32, p. 4-6, citing *Tliche v. Van Quathem* (1998) 66 Cal.App.4th 1054, 1055.) Therefore, the failure to serve defendants within 60 days of filing the complaint does not show that service was improper or that the court does not have personal jurisdiction over defendants.

Next, defendants argue that the service was not performed in strict compliance with the statutory requirements for service of summons. Here, the proofs of service indicate that plaintiff served defendants by substituted service on a co-occupant of their residence, "Victor Zarita", or "Victor Surieta." However, defendants contend that Mr. Surieta has no connection to them other than being a renter at their residence, and thus service was ineffective. Yet defendants cite to no authorities stating that the person who accepts service of summons where service is by substituted delivery must be related or "connected" to the party being served.

Under Code of Civil Procedure section 415.20, subd. (b),

> If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of **a competent member of the household** or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box, **at least 18 years of age**, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing. (Code Civ. Proc., § 415.20, subd. (b), emphasis added.)

"We first note that pre–1969 service of process statutes required strict and exact compliance. However, the provisions are now to be liberally construed to effectuate service and uphold jurisdiction if actual notice has been received by the defendant, '"'and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint....'"' The Supreme Court's admonition to construe the process statutes liberally extends to substituted service as well as to personal service. 'To be constitutionally sound the form of substituted service must be "reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard ... [in order that] the traditional notions of fair play and substantial justice implicit in due process are satisfied." [Citations.]'" (*Bein v. Brechtel-Jochim Group, Inc*. (1992) 6 Cal.App.4th 1387, 1392, internal citations omitted.)

In *Bein*, the Court of Appeal determined that a gate guard in a gated community was a "competent member of the household" and "the person apparently in charge" of the business for purposes of substituted service under section 415.20. "Appellants authorized the guard to control access to them and their residence. We therefore assume the relationship between appellants and the guard ensures delivery of process." (*Id*. at 1393.) "'The evident purpose of Code of Civil Procedure section 415.20 is to permit service to be completed upon a good faith attempt at physical service on a responsible person....' Service must be made upon a person whose 'relationship with the person to be served makes it more likely than not that they will deliver process to the named party.' Here, the gate guard's relationship with appellants made it more likely than not that he would deliver process to appellants. We note they do not claim they failed to receive notice of service." (*Id*. at 1393-94, internal citations omitted.)

Here, Mr. Surieta is described in the proofs of service as being a "co-resident" of defendants' address, who is 40 to 50 years old. Therefore, plaintiff's proof of service adequately demonstrates that Surieta was over the age of 18 and was living at the same address as defendants. Defendants do not deny that Mr. Surieta was a resident of the address, and in fact they admit that he was a renter at their address. (Opposition, p. 5:18.) They contend that they have no "relation" to Mr. Surieta, and that he is not a "competent member of the household." (Rafael Rosales decl., ¶ 4; Maria

Rosales decl., ¶ 4.) However, they state no facts showing that Mr. Surieta was not competent to accept service of summons, or that he was not a member of the household.

There is nothing in the statute that requires any particular relationship between the person who accepts the substituted service and the party on whose behalf they are served, other than the person receiving the summons and complaint be a member of the household who is likely to deliver the documents to the defendant. Here, it appears that Surieta and defendants were in fact living together under the same roof, so they were members of the same household for the purposes of substituted service. Since they were apparently living together in the same house, it was reasonably likely that Surieta would deliver the summons and complaint to defendants. Also, defendants admit that they received the documents from Surieta, so they do not deny having received notice of the action against them. Thus, the court intends to find that Surieta was a proper person to accept the substituted service.

The proofs of service also indicate that the process server made multiple unsuccessful attempts to serve defendants before he resorted to substituted service. The declaration of diligence states that the process server made five unsuccessful attempts to serve defendants at their residence from February 4th to February 11th, 2016 before he served defendants by substitution. Generally speaking, a process server must make at least two or three unsuccessful attempts at service to show diligence before the server can use substituted service in lieu of personal service. (*Espindola v. Nunez* (1988) 199 Cal. App. 3d 1389.) Thus, the process server showed adequate diligence in attempting to effect personal service on defendants before he resorted to substituted service.

Also, the proofs of service state that the summons, complaint, and supporting documents were mailed to defendants at their address after service was substituted on Mr. Surieta. Defendants admit that they live at the address where the documents were mailed. (Rafael Rosales decl., ¶ 2; Maria Rosales decl., ¶ 2.) However, in their motion, they deny receiving the documents in the mail. (Motion, p. 5:23-24.) Yet they do not make this assertion in their declarations, so their denial is not under penalty of perjury and there is no admissible evidence to support their claim that they did not receive the summons and complaint. They also admit that Surieta gave them copies of the summons and complaint. In any event, the alleged fact that they did not receive copies of the summons and complaint in the mail does not mean that they were not properly served. As long as the plaintiff's process server actually mailed the documents, which he swears he did in the proof of service, then the plaintiff has complied with the requirements of the statute. (Code Civ. Proc. § 415.20, subd. (b).) Whether defendants actually received the documents that were mailed is irrelevant to whether service was properly effected.

Therefore, the court intends to find that plaintiff properly served defendants by substitution, and it will deny the motion to quash service of summons.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/25/16.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Carl v. Modern Custom Fabrication, Inc.***
Superior Court Case No.: 14CECG00658

Hearing Date: April 27, 2016 (**Dept. 502**)

Motion: Final approval of class action settlement

Tentative Ruling:

To grant. The Court will execute the order and judgment which have been submitted, and the hearing is off calendar.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/25/16.
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Sandoval v. Parlier Unified School District, et al.***
Court Case No. 14 CECG 01837

Hearing Date: April 27, 2016 (Dept. 502)

Motion: Defendants' Motion for Terminating Sanctions

Tentative Ruling:

To deny.

Explanation:

Plaintiff's address is wrong on the proof of service of the motion. (See Proof of Service of Decker Decl.) The address on plaintiff's complaint is 20231 **E**. Clayton Ave., Reedley, CA 93654. The address on the proof of service for the discovery is 20231 Clayton Ave., Reedley, CA 93654. (See Exhibit A to Hansen Decl.) "[S]ervice of papers to an incorrect address is not proper notice." (*Lee v. Placer Title Co*. (1994) 28 Cal.App.4th 503, 509; *Triumph Precision Products, Inc. v. Insurance Co. of North America* (1979) 91 Cal.App.3d 362, 364-65 [holding that where notice is improperly addressed, it is not effective]; see *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1286 ["The fundamentals of due process include notice and an opportunity to be heard ... Because ASI did not receive adequate notices, the judgment against ASI is void on the face of the record"].)

Because no opposition has been filed to this motion, the court cannot assume that plaintiff has notice of it.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/25/16.
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***Jane Doe et al. v. Orange Center Elementary School et al.***
Superior Court Case No. 14CECG03347 and related cases

Hearing Date: April 27, 2016, 2015 (Dept. 502)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/25/16.
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Paniagua v. Broder Bros.***
Court Case No. 15CECG03707

Hearing Date: **April 27, 2016 (Dept. 502)**

Motion: 1) Defendant's Demurrer to Complaint
2) Defendants Motion to Strike Portions of Complaint

Tentative Ruling:

To overrule the demurrers for uncertainty and for failure to state facts sufficient to constitute a cause of action as to the entire complaint. To sustain the demurrer to the Sixth cause of action, without leave to amend. To sustain the demurrers to the Seventh and Ninth causes of action, with leave to amend. To deny the motion to strike the class allegations (and related references to "other class members"). To grant the motion to strike the reference to Labor Code section 204 in the Tenth cause of action, without leave to amend. To grant the motion to strike the references in the Tenth cause of action to Labor Code sections 226 and 2802, with leave to amend. To deny the request to strike references in the Tenth cause of action to Labor Code sections 201, 202, 1174, and 2800.

Plaintiff is granted 30 days' leave to amend during which time she must meet and confer concerning the amended complaint before a First Amended Complaint is filed. (Code Civ. Proc., § 430.41, subd. (c).) The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the second amended complaint are to be set in **boldface** type.

Explanation:

Demurrer

- *Demurrers to Entire Complaint:*

With its demurrer for uncertainty, defendant essentially argues the entire complaint is uncertain because it is "devoid of specific facts supporting her causes of action." However, a demurrer for uncertainty "does not go to the failure to allege sufficient facts [but instead] goes to the doubt as to what the pleader means by the facts alleged." (*Brea v. McGlashan* (1934) 3 Cal.App.2d 454, 459 (brackets added).)

A general demurrer to the entire complaint will be overruled where *any* cause of action is stated. (*Amacorp Indus. Leasing Co. v. Robert C. Young Associates, Inc.* (1965) 237 Cal.App.2d 724, 727.) The Eighth cause of action, for Violation of Labor Code section 1174, subdivision (d), states a cause of action. This statute requires the employer to maintain accurate and complete records, and section 1174.5 provides for a penalty where the employer willfully fails to do so. Plaintiff alleges that defendants have violated this statute because the payroll records do not show accurate and complete "hours

worked daily and wages paid, to Plaintiff and the other class members." (Compl., ¶103.) Defendant argues plaintiff did not allege "how she knows Broder Bros. did not maintain any of these records or what specific records Broder Bros. did not maintain for her." However, it is not necessary for a plaintiff to allege how they know something; a plaintiff can make allegations on information and belief, and this is perfectly acceptable in an unverified complaint. (Code Civ. Proc. § 446; *Pridonoff v. Balokovich* (1951) 36 Cal.2d 788, 792.) This allegation is made on plaintiff's information and belief (see, *e.g.,* Complaint, ¶¶ 34 and 101). And she does specify what records defendant did not maintain: payroll records. Since there is at least one cause of action stated in the complaint overall, the general demurrer to the entire complaint must be overruled.

- *Demurrer to Sixth cause of action:*

Labor Code section 204 does not provide for a private right of action. The *Johnson* case defendant relies on is cited with approval in a reported District Court case, *Calop Business Systems, Inc. v. City of Los Angeles* (C.D. Cal. 2013) 984 F.Supp.2d 981, not specifically regarding section 204, but for the general proposition that where a Labor Code Statute does not set forth an entitlement to a wage or provide a penalty, but rather indicates civil penalties may be collected *by the Commissioner*, it does not create a private right of action. (*Id.* at p.1015.) Even if a violation of this statute supported plaintiff's Unfair Competition ("UCL") cause of action (see *infra*), that in and of itself would not mean plaintiff was able to state this as a separate cause of action where the statute does not provide for a private right of action. The demurrer is sustained, without leave to amend.

- *Demurrer to Seventh cause of action:*

It appears that the 3-year statute of Code of Civil Procedure section 338 can apply to claims under Labor Code section 226. In the Federal District Court case of *Novoa v. Charter Communications, LLC* (E.D. Cal. 2015) 100 F.Supp.3d 1013, 1024 ("*Novoa*"), the court noted that this statute "provides for both actual damages and penalties," and therefore, "depending on the relief sought, a claim pursuant to Section 226(e)(1) could be subject to a one-year or a three-year limitations period." (*Id.* at pp. 1024-1025.) Furthermore, it is not clear and unequivocal from the face of the pleading that plaintiff's claim is barred even by the one-year statute of limitations period. Plaintiff alleges that she was employed until <u>*approximately*</u> February 2013. Allegations that an event occurred "approximately" or "on or about" the crucial date for statute of limitations purposes overcomes a general demurrer. It is enough that the claim *may* be timely. (*Childs v. State of California* (1983) 144 Cal.App.3d 155, 159.)

But plaintiff has failed to adequately allege actual damage from defendant's failure to comply with section 226. Even after the Legislature's addition of subdivision (e), plaintiff is required to allege <u>*both*</u> 1) a deficient wage statement, and 2) she could not promptly and easily determine from the wage statement (*inter alia*) the wages paid to the employee. It is clear from the cases that not being able to determine "the wages paid" means that the employee cannot determine whether he/she is being underpaid. In *Novoa*, *supra,* the court noted that "2013 Amendment does not represent a substantive shift in Section 226" but instead "simply clarified that the injury requirement is

minimal." (*Novoa,* 100 F.Supp.3d at p. 1029-1030.) It stated that "the 2013 Amendment is best understood as clarifying that the Section 226 injury requirement hinges on whether an employee can "promptly and easily determine" from the wage statement, standing alone, the information needed to know whether he or she *is being underpaid*." *(Id.* at p. 1029, emphasis added.)

Here, plaintiff has alleged that the wage statements failed to include the total number of hours worked (¶96), but that she has been injured *because she was denied her legal right to receive an accurate and itemized wage statement* (¶98). This does not adequately allege the second prong of the claim. Plaintiff must allege that the failure to indicate the number of hours on which the pay was calculated left her unable to determine whether she was underpaid. This would state an actual injury. (See, *e.g., Varsam v. Laboratory Corp. of America* (S.D. Cal. 2015) 120 F.Supp.3d 1173, 1180—allegation that incomplete and inaccurate wage statements had prevented plaintiff "from determining if all hours worked were paid and the extent of the underpayment," which necessitated the lawsuit, was sufficient to plead a violation of section 226.) The demurrer is sustained, but leave to amend is granted.

- *Demurrer to Ninth cause of action:*

Plaintiff's argument that defendant is requiring the pleading of evidentiary facts is not well taken. It is true that it can be difficult to distinguish "ultimate facts" from "evidentiary pleading." However, plaintiff has not alleged any facts beyond the bare-bones recitation of the language of the statute (i.e., that she "incurred necessary business-related expenses and costs that were not fully reimbursed") Where a claim is founded on a statute which is not a codification of preexisting common law, as here, facts in support of each of the requirements of the must be specifically pled. (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 273.) "[S]imply parroting the language of [the statute] in the complaint is insufficient to state a cause of action under the statute. (*Hawkins v. TACA International Airlines, S.A.* (2014) 223 Cal.App.4th 466, 478, *reh'g denied (Feb. 18, 2014), review denied (May 14, 2014)*.) The demurrer is sustained, but leave to amend is granted.

Motion to Strike

Defendant is essentially demurring to the complaint's class action allegations under the guise of a Motion to Strike. In other words, based on arguing that plaintiff has *failed to allege facts sufficient to demonstrate* the viability of her class allegations, it argues these allegations should be stricken as "false and improper." In appropriate cases "the class issue may be properly disposed of by demurrer or motion to strike." (*Canon U.S.A., Inc. v. Superior Court* (1998) 68 Cal.App.4th 1, 5, *as modified (Dec. 9, 1998)* ("*Canon*").) However, in most of the cases cited and discussed by defendant, the issue was decided by demurrer, and not by motion to strike. *Cannon* involved a motion to strike, where defendant successfully moved to strike plaintiff's references to a purported nationwide class, and this appears to have been the appropriate motion, since the appellate court affirmed that it was advisable for the trial court to determine at the pleading stage whether a nationwide class was *proper*. (*Id.* at p. 8—proper for court to determine at pleading stage whether California had a "special obligation" to

undertake the burden of a nationwide class action.") Thus, this was within the ambit of a motion to strike, i.e., whether the class allegations were "improper." The defendant was not asking the court to determine that plaintiffs had *failed to state sufficient facts* to support their allegations.

Defendant cites to the case of *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1234, as a case where the court granted a motion to strike class claims. However, actually that case was an appeal of a ruling on demurrer (the work "strike" is not even mentioned in the opinion). While the case of *Alvarez v. May Dept. Stores Co.* (2006) 143 Cal.App.4th 1223, 1232, did state that it might be "proper to strike class allegations if the face of the complaint and other matters subject to judicial notice reveal the invalidity of the class allegations," that case was an appeal from a ruling on a demurrer. One case defendant cites to in Reply, *In re BCBG Overtime Cases* (2008) 163 Cal.App.4th 1293, involved a motion to strike. However, a closer look at that case shows that this was an appeal from a ruling on an *evidentiary* motion rather than a motion on the pleadings. The court stated:

> BCBG's "motion to strike" was not a motion to strike as used during the pleading stage of a lawsuit in both California and federal procedure. (Code Civ. Proc., § 435; Federal Rules Civ. Proc., rule 12(f).) It was a motion seeking to have the class allegations stricken from the complaint by asking the trial court to hold an evidentiary hearing and determine whether Plaintiffs' proposed class should be certified.
>
> (*Id*. at p. 1299.)

Here, where defendant seeks to have this court determine that plaintiff has *failed to state facts sufficient* as to its class allegations, it should have brought this motion via demurrer, and not as a motion to strike. Furthermore, even on demurrer, "where there is a 'reasonable possibility' that the plaintiff in a class action can establish a community of interest among potential claimants, the preferred course is to defer a decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation." (*Rose v. Medtronics, Inc.* (1980) 107 Cal.App.3d 150, 154.) Here, the complaint alleges facts that tend to show an ascertainable class of plaintiffs and that questions of law and fact are common to that class. This has been held sufficient to survive demurrer. (*Prince v. CLS Transp., Inc.* (2004) 118 Cal.App.4th 1320, 1326; *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 963, *as modified (Mar. 30, 2000)*.) Defendant has failed to establish there is no possibility that plaintiff can establish a community of interest among potential claimants, so even if it had filed a demurrer instead of a motion to strike, the result would be the same. The motion to strike the class allegations is denied.

As to the request to strike allegations from the UCL claim (Bus. & Prof. Code § 17200, et seq.), defendant ties this to arguments made in the demurrer as to the insufficiency of plaintiff's claims regarding Labor Code sections 204, 226, and 2802. Defendant's argument as to section 204 is well taken. Plaintiff appears to be precluded from alleging a violation of this statute under her UCL claim, since a UCL claim allows her to seek only restitution or injunctive relief (Bus. & Prof. Code § 17203). She cannot seek restitution as this statute does not provide for payment of wages (which would

allow for restitution), but provides only for penalties. Nor can she seek injunctive relief as she is a former employee, not a current one. (See *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, 131 S.Ct. 2541, 2559-2560—plaintiffs no longer employed by Walmart lacked standing to seek injunctive or declaratory relief against employment practices.) The motion to strike the reference to Labor Code section 204 in the Tenth cause of action is granted, without leave to amend.

As for defendant's request to strike the references to sections 226 and 2802, in keeping with this court's ruling on demurrer (finding plaintiff's claims of violations of these statutes subject to demurrer), the motion is granted, with leave to amend.

It is noted that defendant includes within its request to strike statutes that it has not established on demurrer are defective as a matter of law, namely Labor Code sections 201, 202, 1174, and 2800. The request to strike reference to these statutes is denied.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/26/16.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Gonzalez v Vemma Nutrition Company***
Court Case No. 14CECG00134

Hearing Date: April 27, 2016 (Department 502)

Motion: Application by defendants and cross-defendants, Union Pacific Railroad Company and Romel Green, for Determination of Good Faith Settlement with plaintiff Alexandra Sanchez Martinez

Motion by defendant and cross-complainant Vemma Nutrition Company to contest good faith settlement

Tentative Ruling:

To deny the application and grant the motion.

Explanation:

A prime consideration for the Court in determining if a settlement is in good faith is "a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability." *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.* (1985) 38 Cal. 3d 488, 499. Plaintiff claims some $5,000,000 in damages, as well as unknown future damages. The settlement offered is $100,000.00.

The Court in *Mattco Forge, Inc. v. Arthur Young & Co*. (1995) 38 Cal. App., 4th 1337 found that the trial court abused its discretion where it approved a settlement representing less than 1% of the damages sought. "If there is no substantial evidence to support a critical assumption as to the nature and extent of a settling defendant's liability, then a determination of good faith based upon such assumption is an abuse of discretion." (Id. at 1350, citing *Tech-Bilt*.) No such evidence was set forth in the application in this case. The sole evidence offered consisted of the opinions and conclusions of the railway defendants' respective attorneys.

See also *Long Beach Memorial Medical Center v. Superior Court* (2009) 172 Cal. App. 4th 865, finding that a settlement for 2% of the damages could not, under the circumstances, be determined to be good faith. Expert testimony was offered there, as to the breaches of care by a settling doctor. "Even a slight probability of liability on Dr. Asrat's part would warrant a contribution more significant than 2%." (*Id*. at 874.)

That case also holds that information obtained after the settlement is reached is not appropriately considered in determining good faith. (*Id*.) "Practical considerations require the evaluation be made on the basis of information available at the time of settlement" *Tech Bilt, Inc. v. Woodward-Clyde* & Associates, supra, 38 Cal. 3d at 499. Thus the deposition of plaintiff as well as the supplemental discovery responses cannot be considered.

Inadequate evidence of applicants' portion of liability or lack thereof has been presented.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 4/26/16.
(Judge's initials) (Date)

Tentative Rulings for Department 503

(29)

Tentative Ruling

Re: ***Madhu Sameer v. Sameer Khera***
Superior Court Case No. 14CECG03660

Hearing Date: April 27, 2016 (Dept. 503)

Motion: Plaintiff's motion to reconsider

Tentative Ruling:

To deny. (Code Civ. Proc. §1008(a).)

Explanation:

A motion for reconsideration must be based upon new or different facts, circumstances, or law. (Code Civ. Proc. §1008(a).)

While it is unfortunate that Plaintiff has experienced technological difficulties in accessing the Court's tentative rulings from New Zealand, this is not a new or different fact or circumstance. That Defendant filed motions or pleadings during Plaintiff's absence from the country is also not a new or different fact or circumstance. The substitution of attorney form to which Plaintiff refers was never filed with this Court. The omission of the July 15, 2015, date in the last paragraph of the tentative ruling on Plaintiff's set aside motion was a typographical error. The tentative ruling denied Plaintiff's motion in its entirety.

Plaintiff's support for the instant motion fails to state or show new or different facts, circumstances, or law applicable to this Court's ruling on Plaintiff's motion to set aside. Accordingly, Plaintiff's motion is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 4/26/16 .
(Judge's initials) (Date)

(27) **Tentative Ruling**

Re: ***Fresno First Bank v. Central Valley Presort***
Superior Court Case No. 15CECG02229

Hearing Date: **April 27, 2016 (Dept. 503)**

Motion: Defendants' motion to set aside defaults

Tentative Ruling:

To grant the motion to set aside the defaults entered as to each moving defendant. The request for fees is granted in the reduced amount of $500 payable by defense counsel to plaintiff's counsel within thirty (30) days from the day of this order.

Explanation:

Under CCP § 473(b), "a party will be relieved if a default judgment or dismissal is the result of its attorney's mistake, inadvertence, surprise, or neglect, without regard to whether the neglect is excusable." (*Henderson v. Pacific Gas and Elec. Co.* (2010) 187 Cal.App.4th 215, citing, (*J.A.T. Entertainment, Inc. v. Reed* (1998) 62 Cal.App.4th 1485, 1492.) The attorney affidavit evidences the mistake – additional evidence is not required under CCP § 473(b). (*Hu v. Fang* (2002) 104 Cal.App.4th 61, 65.)

In the present case, as required under CCP § 473(b), defense counsel filed a declaration specifically admitting the failure to file a responsive pleading resulted from his own error. Additional evidence is not required. (*Hu v. Fang*, *supra*, 104 Cal.App.4th at 65.) Accordingly, the error falls within the mandatory relief prong of CCP § 473(b). The motion is granted.

Reasonable Compensatory Legal Fees and Costs

"The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay ***reasonable*** compensatory legal fees and costs to opposing counsel or parties." (CCP § 473(b) emphasis added.)

Here, plaintiff's counsel claims to have incurred $445 in preparing the requests for entry of default and $3,038 in preparing the December 2015 prove-up application. (Dec. of Matthew G. Backowski, ¶¶ 5-7.)

Defense counsel's appearance at the December 1, 2015 ex parte hearing indicated that the defendants likely intended to participate in the case. Nevertheless, plaintiff's counsel continued to prepare a prove-up brief for the January 5, 2016 default judgment hearing. Moreover, the prove-up application itself lacked elemental requirements which does not reflect plaintiff's counsel's claim of almost 10 hours of preparation. Lastly, the requests for entry of default were only minimally completed – another cause for the denial of default judgment on January 5.

However, defense counsel, though appearing at the December 1 ex parte hearing, admits he knew of the defaults in mid-November. Yet, there is no indication he promptly contacted plaintiff's counsel to inquire about stipulating to set aside the defaults.

Considering plaintiff's counsel's filing of the prove-up brief after there were clear indications the defendants intended to participate in litigation, the requested amount of $3,483 is unreasonable. However, defense counsel could have acted more promptly in setting aside the defaults or at least informing opposing counsel of such intention. Accordingly, the request for fees is granted but in the reduced amount of $500 payable to plaintiff's counsel within thirty (30) days from the date of this order.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 4/26/16 .
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: **MCT Group v. Rank**

Case No. 15CECG02729

Hearing Date: April 27, 2016 (Dept. 503)

Motion: By Defendant Specially Appearing to Quash the Service of Summons by Plaintiff MCT Group.

Tentative Ruling:

To treat the motion to quash as a motion to set aside the default pursuant to Code of Civil Procedure §473, subdivision (d) for lack of personal jurisdiction due to improper service.

The default is set aside and the service of the summons is quashed.

Explanation:

Defendant has made a motion to quash the subpoena served by substitution. Since the Court had already entered default before the motion was filed, the Court exercises its jurisdiction to treat this as a motion to set aside the default.

When moving to set aside a default on the grounds that there was no proper service, the motion is properly made under Code of Civil Procedure §473, subdivision (d) for lack of personal jurisdiction rendering the default void as a matter of law. When deciding on whether to set aside a default on the basis of lack of service, there is no need for the defendant to show a meritorious defense and prejudice is not a factor in the determination. (*Peralta v. Heights Med. Ctr., Inc.* (1986) 485 US 80, 86-87 (matter is one of due process); *Sindler v. Brennan* (2003) 105 Cal.App.4th 1350, 1354 (prejudice is not a factor).)

Generally speaking, when a motion to quash is filed, the burden of proof is on the plaintiff to prove the facts requisite to an effective service. (*Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 413.)

As an initial matter, it seems clear that personal service was not effectuated; Defendant's evidence is that she does not match the description provided by Plaintiff's process server and Plaintiff does not seem to contest this.

Defendant contends substituted service was not effective because Plaintiff's process server did not fully comply with Code of Civil Procedure §415.10, subdivision (b) insofar as that section requires that the papers be left "at the person's dwelling house, usual place of business, or usual mailing address." As evidence, Defendant provides Defendant's declaration indicating that she had moved from the subject address effective just over a month the purported service as well as an "Official Change of Address Confirmation Letter" from the US Postal Service.

Plaintiff responds that, even if Defendant is no longer at that address, "[l]iving at an address is not a requirement for service. Defendant need only receive mail at the address." Plaintiff cites to no authority for this proposition. In fact, the statute requires the delivery of papers to the "usual mailing address." If, at the time of the purported service, the subject address was no longer Defendant's "usual mailing address" then the service is simply not complete. (*Cf. American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 392 (actual notice is not a valid substitute to confer jurisdiction when there has been a complete failure to comply with the statutory service of process requirements).) Therefore, even if the documents were ultimately received by Defendant via mail, the fact that they were not left with a "competent member of the household" at Defendant's abode or "usual mailing address" indicates that service was not complete.

Plaintiff suggests that a hearing on the issue might be appropriate to ascertain whether Ms. Rank still receives mail at the Tollhouse Road address. Plaintiff requests an opportunity to ask the current resident of Tollhouse Road, a Ms. Kant, whether she receives Ms. Rank's mail and forwards it to Ms. Rank. There appears to be no formal request for discovery or oral testimony. (*See, e.g., Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703, 711.) Therefore, the Court will only consider the evidence presented to it on this motion.

Given that Plaintiff has presented no evidence that the subject property is not Defendant's usual mailing address," and given that the burden to show service and jurisdiction is on Plaintiff, the default is set aside pursuant to Code of Civil Procedure §473, subdivision (d) and the service is ordered quashed effective the date of this order.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 4/26/16 .
(Judge's initials) (Date)